



**POINTS AND AUTHORITIES**

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## **INTRODUCTION**

In this case, plaintiff-appellant Lease Management Equipment Corporation (“LMEC”) claims that defendants-appellees DFO Partnership (“DFO”), Security Pacific Leasing Corporation n/k/a BAL Investment & Advisory, Inc., and Ford Motor Credit Company n/k/a Ford Motor Credit Company LLC breached a remarketing agreement by not paying LMEC remarketing fees when the U.S. Navy exercised its exclusive early purchase option to acquire two oil tankers. After a four-day bench trial, Circuit Judge Suriano found that LMEC is not entitled to a remarketing fee here because the net proceeds from the tanker sales fell below the contractual threshold for a remarketing fee. That factual finding, which all of the trial evidence—the contract language, testimony from both of the contract negotiators, and the only expert testimony—supports, is entitled to deference and should be affirmed.

Affirmance is also warranted on the alternative ground that LMEC is not eligible for a remarketing fee when the Navy exercises its purchase option. The terms of the relevant contracts, changes made in drafting the remarketing agreements, and testimony from both contract negotiators all support that conclusion. No question is raised on the pleadings.

## **ISSUES PRESENTED**

1. Was the trial judge’s factual finding that the remarketing agreements preclude a remarketing fee here because the net proceeds from the Navy tanker purchases fall short of the contractual fee threshold against the manifest weight of the evidence, where the relevant contracts, testimony from both of the contract negotiators, and un rebutted expert witness testimony all support that finding?

2. Did the trial judge abuse his discretion or otherwise err in admitting extrinsic evidence on whether the remarketing agreements preclude a remarketing fee?

3. Should the judgment for defendants be affirmed on the alternative ground that the remarketing agreements preclude a remarketing fee upon a purchase option exercise, as the relevant contracts, changes to the remarketing agreements, and testimony from both contract negotiators demonstrate?

## STATEMENT OF FACTS

### A. Leveraged Leasing Principles.

This case arises out of two tax-advantaged leveraged lease transactions that Beatrice Financial Services (“BFS”) and the U.S. Navy entered into in 1986. In a leveraged lease, one party (here, BFS) borrows money to purchase equipment (here, oil tankers), leases that equipment to another party (here, the Navy), and then uses the rent paid by the lessee (the Navy) to repay the loan and earn a profit. R C4524-25 (DA 160-61).

Leveraged lease transactions are carefully negotiated and structured to provide the owner-lessor a promised rate of return, known as the after-tax yield. R C4539-41 (DA 167-69). The after-tax yield is comprised of three elements: pre-tax profits, a residual, and tax benefits. R C4529-30 (DA 162-63). The pre-tax profit is what the owner-lessor will net from the lessee’s rent payments after paying the principal and interest on the loan and other transaction costs. R C4530 (DA 163). The rent is purposely set to exceed those costs throughout the life of the lease, guaranteeing a pre-tax profit. *Id.* The residual is the amount the owner-lessor expects to receive from selling the equipment at the end of the lease term. R C4529-30 (DA 162-63).

At the time of the Navy tanker transaction at issue here, a leveraged lease gave an owner-lessor two types of tax benefits. The owner-lessor could deduct from its taxable income both (a) interest payments on the loan used to purchase the equipment and (b) accelerated depreciation costs of the equipment. R C4530-31 (DA 163-64).<sup>1</sup> Those tax benefits were available, however, only if the lease transaction had actual “economic substance”—a principal measure of which is whether the transaction, when agreed to, was expected to be profitable on a pre-tax basis. R C4533 (DA 166). If a leveraged lease did not appear to be designed to make a pre-tax profit for the owner-lessor, the tax benefits would not be available, which would be a “disaster” because the absence of tax benefits would “completely undermin[e] all of the economics and all of the intended consequences of the transaction” by cutting the after-tax yield. R C4532 (DA 165). Parties to a leveraged lease transaction, therefore, carefully design the transaction to ensure that it will give the owner-lessor a pre-tax profit. R C4541-42 (DA 169-70).

Predetermined “termination values” are one important way leveraged leases guarantee a pre-tax profit. One possible risk of a long-term lease from the owner-lessor’s perspective is that the lease might not continue for the entire lease term, in which case the owner-lessor would stop receiving the rent payments needed to repay the loan and get the promised return. To make the owner-lessor whole in that event, leveraged leases include a “termination value” table that sets forth minimum amounts the lessee must pay if the lease ends early. R C4550-54 (DA 172-76); R C4299-301 (DA 125-27). The termination values, which are lump-sum replacements for rent and the assumed residual, are carefully

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<sup>1</sup> A key purpose of leveraged lease deals was to enable a lessee (like the Navy), which needed equipment but was unable to use an equipment owner’s tax benefits, to in effect transfer those benefits to a lessor (like BFS), who could use the tax benefits.

calculated to ensure that, even if the leveraged lease transaction ends early, the owner-  
lessor will receive an amount sufficient to pay off the loan and provide the promised  
yield. R C3981 (DA 94); R C4550-59 (DA 172-76).

**B. The Navy Tanker Leases.**

These leveraged leasing principles guided the 1986 BFS-Navy transactions. R  
C12 (Compl. ¶ 10). BFS borrowed money to acquire two tankers, the Gianella and the  
Matthiesen (which Wilmington Trust Company held in trust for BFS's benefit). R C7474  
(DA 329; Gianella EPA § 2.1); R C7583 (Matthiesen EPA § 2.1).<sup>2</sup> BFS (through  
Wilmington Trust) then indirectly leased each tanker to the Navy for 20 years.

Because federal regulations barred the Navy from entering into any contract  
exceeding five years, however, this leveraged lease transaction required two separate but  
interlocking leases. R C4294-95 (DA 120-21). BFS leased each tanker to a Contractor  
for 20 years pursuant to essentially identical Bareboat Charters.<sup>3</sup> R C5005 (DA 256;  
Gianella BC § 1.2); R C5089 (Matthiesen BC § 1.2). At the same time, the Contractors,  
which agreed to operate the tankers for the Navy, leased each tanker to the Navy pursuant  
to essentially identical Time Charters. R C5256 (DA 264; Gianella TC); R C5440  
(Matthiesen TC).

Each Time Charter had an initial term of five years and allowed the Navy to  
renew for an additional five years, up to three times, for a total of 20 years. Although the  
Time Charter technically was only a five-year contract (to comply with federal

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<sup>2</sup> Because the documents for both tankers are substantially identical, we will cite only the  
Gianella documents unless the Matthiesen ones are different. The document acronyms  
are explained on DA 1 of defendants' Supplementary Separate Appendix ("DA").

<sup>3</sup> Leases of ships are referred to as "charters." A "bareboat charter" leases the ship  
without a crew. A "time charter" leases a ship for a period of time, often with a crew.

regulations), it contained a termination value schedule covering 20 years, designed so that BFS would be able to repay the loan and earn the promised yield if the lease ended before 20 years passed. R C5261-62 (DA 265-66; TC Art. 4(a)); R C4550-54 (DA 172-76); R C5887-88 (DA 318-19; Gianella TV Sched.); R C5895-96 (DA 320-21; Matthiesen TV Sched.). The two lease structure created a “pass-through” between BFS and the Navy so that amounts due from the Navy to the Contractors under the Time Charters would be due from the Contractors to BFS under the Bareboat Charters. R C5020-21 (DA 258-59; BC § 6.2); R C4412 (DA 140); R C8050 (DA 346) (LMEC’s counsel).

**C. Expiration, Termination, and Navy Purchase Option.**

The lease documents provided three principal ways for the leveraged lease to end: expiration, termination, and purchase option exercise. First, the leases—both the Bareboat Charters and the Time Charters—would expire at the end of the 20-year term. R C5261-64 (DA 265-68; TC Art. 4); R C5015 (DA 257; BC § 4.1). Second, the Navy could “terminate” before the 20-year term expired by declining one of the five-year Time Charter renewal periods or otherwise terminating the Time Charter. R C5271-72 (DA 269-70; TC Art. 5(b)(1)). Significantly, if the Navy terminated early, it would have to pay BFS at least the Termination Value specified for the relevant termination date. R C5271-72, C5275 (DA 269-70, 273; TC Art. 5(b)(1), 5(b)(7)). Third, each Time Charter granted the Navy an exclusive option to purchase the tanker on specific dates prior to expiration of the 20-year term. R C5280 (DA 278; TC Art. 5(h)(1)). If the Navy exercised its purchase option, the purchase price would be set by agreement or an appraisal procedure, and in either case the Navy would have to pay at least the applicable Termination Value. R C5283-85 (DA 281-83; TC Art. 5(h)(3), 5(h)(5)).

In the first two instances—if the leases “expired” at the end of the 20-year term or the Navy “terminated” before then—the Time Charter required the Navy to “redeliver the Vessel to the Contractor,” which in turn was required to return the tanker to the owner-lessee (BFS). R C5272-74, C5264, C5338-39 (DA 270-72, 268, 285-86; TC Art. 5(b)(4), 5(b)(6), 4(c), 34(a)); R C5030 (DA 260; BC § 11.1). The owner-lessee then would incur the costs associated with possession of the tanker (*e.g.* labor, insurance, docking, and storage) until it was able to sell or re-lease the tanker. Conversely, if the Navy exercised its purchase option, the owner-lessee would not shoulder those possession costs because the Time Charter did *not* require the Navy to return the tanker to the Contractor for delivery to BFS; instead, the owner-lessee had to “convey the vessel to the [Navy] ‘as is, where is.’” R C5284 (DA282; TC Art. 5(h)(5)); R C5039-40 (DA 261-62; BC § 16.4).

In mid-January 2003, over two years before the 20-year term of the Navy tanker transaction was scheduled to expire, the Navy exercised its early purchase option, buying the two tankers for a negotiated “fair market value” of \$25 million per tanker. R C5797 (DA 291; Gianella VPA); R C5803 (DA 296; Matthiesen VPA). Significantly, because the \$25 million price exceeded the applicable Termination Value (the minimum amount due from the Navy at that time for each tanker), the Navy did not pay Termination Value.

#### **D. The Tanker Remarketing Agreements.**

In connection with the 1986 BFS-Navy tanker transactions, BFS separately engaged plaintiff LMEC (a wholly-owned affiliate of Deerpath Inc., the firm that arranged the transactions (R C12 (DA 4; Compl. ¶¶ 8, 10)), to provide remarketing assistance to BFS. Such a remarketing arrangement helps protect an owner-lessee like BFS from incurring the costs of possession (insurance, docking, storage, labor, etc.) by

putting in place a means to rapidly sell or re-lease equipment after a lease ends. *See Lease Mgmt. Corp. v. G.I.C. Fin. Servs.*, 202 Ill. App. 3d 188, 190-91 (1st Dist. 1990). BFS executive Ingrid Sarapuu (“Sarapuu”) and LMEC executive Duane Huffine (“Huffine”), with the assistance of LMEC’s and BFS’s shared counsel Winston & Strawn (R C4007 (DA 100)), negotiated and memorialized the remarketing arrangement in tanker-specific but otherwise identical remarketing agreements. R C4956 (DA 244; Gianella RA); C4980 (Matthiesen RA).

The issue in this case is whether LMEC was entitled to a fee under the remarketing agreements following the Navy’s exercise of its early purchase option. LMEC contends (at 13) that it is eligible for a remarketing fee whenever the leveraged lease ends, even if BFS needed no help finding a buyer because the Navy exercised its purchase option. LMEC further contends (at 17) that the contractual fee formula entitles it to remarketing fees for both tankers totaling almost \$8 million.

At trial, DFO—which succeeded to BFS’s interests as owner-lessor—and the other defendants denied that LMEC is entitled to any fee under the tanker remarketing agreements for two reasons. First, defendants argued that the fee formula of the tanker remarketing agreements results in no fee here. The fee formula requires subtraction of “Equipment Charges,” which in pertinent part are defined to include any amounts “due and unpaid by the lessee, directly or indirectly to [the owner-lessor] with respect to the Vessel under the Bareboat Charter . . . which amounts relate to periods on or prior to the Expiration Date.” R C4957 (DA 245; RA ¶ 1(a)). As both of the authors of the tanker remarketing agreements confirmed, this definition includes Termination Value, which was the minimum amount *due* under the charters, was attributable to specific *periods*

*prior to an Expiration Date*, and was *unpaid* here because it did not exceed the purchase price. R C4440-42 (DA 152-54; Huffine); R C3981 (DA 94; Sarapuu). When Termination Value is accounted for, the fee calculation results in no fee.

Second, defendants argued that no remarketing fee is ever owed when the Navy exercises its early purchase option. The parties specifically rejected triggering a remarketing fee whenever the lease ends. Instead, they provided that a remarketing fee may be available only after the “Expiration Date,” which is defined as the date on which “the Navy is required to return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter.” R C4958 (DA 246; RA ¶ 1(c)). As noted above, the Time Charter does *not* require the Navy to return possession of the tanker to the Contractor (or anyone else) when the Navy buys the tanker pursuant to its early purchase option. Therefore, no remarketing fee was due upon the Navy’s purchase option exercise.

#### **E. Trial Testimony**

At the trial, both BFS’s Sarapuu and LMEC’s Huffine (Huffine testified by videotaped evidence deposition) described the contract negotiations and explained why LMEC is *not* entitled to a remarketing fee under the tanker remarketing agreements.

***Remarketing fee formula.*** Sarapuu testified that remarketing fees are designed to reward a remarketer for helping the owner-lessor recover more than the promised yield reflected in Termination Value. R C3958 (DA 86). Consequently, Sarapuu testified, “the remarketing agreement was created in such a way that until [BFS] got its full expected returns . . . a remarketing fee wouldn’t kick in.” R C3985 (DA 86). LMEC’s Huffine concurred, explaining that Termination Value fits the portion of the Equipment Charges definition covering “amounts received or then due by the lessee directly or indirectly to

[the owner-lessor] with respect to the vessel under the Bareboat Charter” because it is “an amount owed.” R C4442 (DA 154). Huffine added that with Termination Value properly accounted for, “no remarketing fee is owed” to LMEC here. R C4440 (DA 152).

***Expiration Date.*** Huffine and Sarapuu also described their negotiations concerning when a remarketing fee would be triggered. LMEC, BFS, and their shared counsel at Winston & Strawn used a December 1983 remarketing agreement between BFS and LMEC as a “template” from which to draft the tanker remarketing agreements. R C3967 (DA 87; Sarapuu); R C4297, 4404-05 (DA 123, 138-39; Huffine); R C5857 (DA 303; Template). Under the template, a lessee’s exercise of its early purchase option could have given rise to a remarketing fee. Sarapuu testified, however, that she did not believe LMEC should get a remarketing fee when BFS would not need remarketing help, including when the Navy exercised its purchase option. R C3968-69, C3987, C3993 (DA 88-89, 97, 98). Sarapuu therefore requested two changes in the tanker remarketing agreements, to which Huffine ultimately agreed. R C3977-78, C3993 (DA 90-91, 98).

First, the template provided that a remarketing fee would be calculated from amounts “received from the sale, lease or other use or disposition of each item of such Equipment Group after its Expiration Date, *whether to or by the lessee exercising its rights under the Lease of such item.*” R C5860 (DA 306; Template ¶ 1(e)) (emphasis added). The italicized clause would have included amounts received from the lessee’s exercise of its early purchase option, because an early purchase option is one of the lessee’s rights under the lease. At Sarapuu’s request, that clause was deleted in drafting the tanker remarketing agreements. *Compare* R C5860 (DA 306; Template ¶ 1(e)) *with* R C4958 (DA 246; RA ¶ 1(b)); R C3969 (DA 89; Sarapuu).

Second, the template provided that a remarketing fee could be triggered only by an “Expiration Date,” defined as “*the date of expiration or earlier termination of the initial lease term for such item.*” R C5860 (DA 306; Template ¶ 1(f)). Because the lease could terminate if the lessee exercised its early purchase option, the template’s definition of Expiration Date could have allowed a fee following the lessee’s exercise of its early purchase option. LMEC contends (at 13) that the Remarketing Agreement should be read as if it still says a remarketing fee is triggered whenever the lease ends. In reality, however, the parties changed the definition of Expiration Date to the date on which “the Navy is required to return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter.” *Compare* R C5860 (DA 306; Template ¶ 1(f)) *with* R C4958 (DA 244; RA ¶ 1(c)). LMEC’s Huffine testified that the new “return possession of the Vessel to the Contractor” provision was added at Sarapuu’s request to ensure that the owner-lessor would not have to pay a remarketing fee if the Navy “did not return the vessel” under the Time Charter provision requiring the Navy “to redeliver the vessel when the term was over.” R C4434-36 (DA 146-48). As noted earlier (p. 6, *supra*), while the Time Charter expressly required the Navy to “redeliver the Vessel to the Contractor” when the Time Charter expired after 20 years or was terminated early, *it imposed no such requirement when the Navy exercised its early purchase option.*

#### **F. Expert Testimony**

Defendants also presented the testimony of leveraged leasing expert Christopher Gould (“Gould”). Gould testified that remarketing fees are never available unless and until the owner-lessor first recovers the full termination value and promised yield. R C4634-36 (DA 196-98). Gould then showed that, whereas defendants’ interpretation

of the contracts was wholly consistent with established leveraged leasing practice and the promised economics of the transaction, LMEC's interpretation of the contracts (leading to the massive fee LMEC demands) was completely inconsistent with the entire economic foundation of the transaction. Gould explained that not only would LMEC's interpretation prevent the owner-lessor from obtaining the promised yield, but for much of the 20-year lease term it would have caused the owner-lessor to sustain massive losses while the remarketer (LMEC) would pocket huge, pointless fees. R C4592-94 (DA 184-86). Gould testified that LMEC's interpretation not only made no economic sense, but would have disqualified the transaction from receiving the promised tax benefits. R C4586-87, C4606-07 (DA 182-83, 191-92). Indeed, LMEC's interpretation would have made BFS's representation to the IRS that the transaction was expected to produce a pre-tax profit (which BFS expressly made in a request for advance approval of the tax benefits) false. R C4603-09 (DA 188-94; Gould).

LMEC did not present any testimony or evidence to rebut Gould's expert testimony, which stands unchallenged in the record. In fact, with the exception of LMEC's current owner, Richard Fanslow—who had no involvement with LMEC or the Navy tanker transactions until the mid-1990s,<sup>4</sup> and testified only to the mathematics of LMEC's damages calculation—LMEC did not present any witnesses at all.

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<sup>4</sup> In 1994, after LMEC's parent company Deerpath declared bankruptcy, a Deerpath creditor sold LMEC's rights under 29 remarketing and participation agreements to a Fanslow entity for \$3.1 million. R C3136-37 (DA 28-29; Humphrey Aff.); R C3139 (DA 30; Bill of Sale). The two remarketing agreements at issue here were among those 29 agreements. The trial judge erroneously barred defendants from offering evidence on these events (R C4155-58 (DA 106-09)), which are probative on Fanslow's relationship with LMEC and the value of LMEC's rights under the tanker remarketing agreements.

## **G. Procedural History**

**Complaint.** In July 2003, LMEC sued DFO and its two partners, claiming a right to remarketing fees for the Navy’s purchase of the Gianella and the Matthiesen. R C10 (DA 2; Compl.). The complaint asserted that the Navy’s purchase option exercise was a “remarketing event” entitling LMEC to a fee because the purchase resulted in “a termination of the Time Charter.” R C21-22 (DA 5-6; Compl. ¶ 47). The complaint also proclaimed LMEC would prove that assertion with “extrinsic evidence.” *Id.*

**Motion to Dismiss.** When defendants moved to dismiss, LMEC argued that the requisite Expiration Date occurred “when the Time Charter terminate[d] by reason of the Navy’s purchase” and that, alternatively, ambiguity in the Expiration Date definition required resort to parol and other extrinsic evidence that supposedly favored LMEC’s reading. R C392-97 (DA 8-13; Mem.). LMEC pointed to three pieces of extrinsic “evidence”: (1) BFS “representations” to the IRS “about a Navy purchase”; (2) “parol evidence” regarding “the intent of BFS and DFO”; and (3) “the economics of the deal.” R C395-96 (DA 11-12; Mem.). The Circuit Judge presiding over the case at that time, Judge Preston, denied defendants’ motion to dismiss (R C487 (DA 16; Order)), stating his view that the relevant contracts were not “crystal clear” (R C482 (DA 15; Tr.)).

**Summary Judgment.** The extrinsic evidence uncovered in discovery—contract negotiator testimony and the template—contradicted LMEC’s claim for a remarketing fee. Based on that evidence and the contractual language foreclosing a remarketing fee, defendants moved for summary judgment. Defendants argued that LMEC was not eligible for a remarketing fee because (a) the required Expiration Date never occurred and (b) the contractual fee formula results in no fee after the required subtraction of

Termination Value. R C2413 (Mem.); R C3079 (Reply). In response, LMEC abandoned its promise to supply extrinsic evidence proving its claims, insisting instead that the court disregard the abundant extrinsic evidence refuting its claims because the relevant contracts were supposedly unambiguous. R C2714-18, C2723-24 (DA 18-22, 23-24; Mem.). Judge Preston denied summary judgment (R C3264 (DA 38; Order)), stating that he wanted to evaluate the credibility of the witnesses (R C3257-58 (DA 36-37; Tr.)).

***Preston Recusal.*** On the day the trial was to start, Judge Preston revealed that he had recently purchased \$27,000 of Bank of America stock. R C3748, C3753 (DA 48, 49; Tr.); R C3768-69 (DA 53-54; Tr.). Bank of America is the parent corporation of a defendant. Recusal is mandatory in such circumstances (Ill. Sup. Ct. R. 63(C)(1)(d)), and ultimately, Judge Preston decided to recuse himself. R C3792 (DA 59; Order); R C3788-89 (DA 57-58; Tr.).<sup>5</sup> The case was then immediately reassigned to Judge Suriano, who started the trial the next day. R C3795 (DA 61; Order); R C3807 (DA 63; Tr.).

***Trial.*** At trial, LMEC sought remarketing fees and prejudgment interest for the two tankers totaling almost \$10 million. LMEC also sought to exclude virtually all of the extrinsic evidence on the meaning of the various contracts. After hearing extensive argument, Judge Suriano rejected LMEC's bid to exclude the extrinsic evidence of the parties' intent, finding the contract language ambiguous. R C4793, C4798-4800 (DA 207, 212-14; Tr.). At the conclusion of the bench trial, Judge Suriano entered judgment for the defendants, ruling that no remarketing fee was owed to LMEC. R C4941 (DA

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<sup>5</sup> LMEC's counsel opposed recusal, claiming that he had "never heard Bank of America mentioned in this case." R C3753-55 (DA 49-51). In reality, Bank of America's role in this case was well known to LMEC's counsel, who not only identified the bank in the complaint (R C11 (DA 3; Compl. ¶ 4)), but also deposed a bank officer involved in the decision not to pay a remarketing fee. R C4257, C4273 (DA 113, 119; Moskowitz).

243; Order). Judge Suriano expressly found that the parties “intend[ed] to include termination value as part of the equipment charges” (R C4894 (DA 239; Tr.)), and that after deducting Termination Value there was “no money there [above the fee threshold] that entitles [LMEC to] a fee” (R C4895-96 (DA 241-42; Tr.)). In dicta, Judge Suriano also commented that he would “construe the ambiguity” in the Expiration Date definition “against the maker of the document,” whom he incorrectly presumed was defendants, acting through Winston & Strawn. R C4893 (DA 239; Tr.).

*Post-Trial Motion.* Plaintiff LMEC moved to vacate the judgment. R C6856-95. After extensive briefing and argument, Judge Suriano reaffirmed his ruling that LMEC was not entitled to a fee. R C8076 (DA 350; Order). He held that the Equipment Charges provision is ambiguous and that the extrinsic evidence—including testimony from Sarapuu, Huffine, and Gould—proved that the “parties intended termination value to be an equipment charge.” R C8056-57 (DA 348-49; Tr.). The resulting need to subtract Termination Value in calculating the remarketing fee, Judge Suriano ruled, precluded LMEC from recovering any remarketing fee. R C8057 (DA 349; Tr.). Also, after being advised of the uncontested, albeit brief and unremarked upon, testimony that the Winston & Strawn lawyers who drafted the remarketing agreements represented both parties, not just BFS, Judge Suriano seemed to recognize that reading the remarketing agreements in LMEC’s favor was a mistake. R C8040-42 (DA 343-45; Tr.) (“I don’t know where I came up with that.”).

#### **GOVERNING LEGAL PRINCIPLES AND STANDARD OF REVIEW**

In reviewing Judge Suriano’s interpretation of the remarketing agreements at issue here, the “principal objective . . . is to give effect to the intent the parties possessed

at the time they entered into th[ose] agreement[s].” *First Bank & Trust Co. of Ill. v. Vill. of Orland Hills*, 338 Ill. App. 3d 35, 40 (1st Dist. 2003). To discover the agreed party intent, the Court should look not just to the language of the agreements but also to evidence of negotiations between the contracting parties and changes from prior agreements. *Martindell v. Lake Shore Nat’l Bank*, 15 Ill. 2d 272, 283 (1958) (“previous agreements, negotiations and circumstances may be considered in determining the meaning of specific words and clauses” of a contract). In addition, the Court should insist that the agreements be construed “reasonably to avoid absurd results.” *Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 524 (2d Dist. 1997).

The core of LMEC’s appeal is a challenge to Judge Suriano’s factual finding that BFS and LMEC intended no remarketing fee to be paid in the circumstances of this case. “The circuit court’s determination of the intent of the parties will not be disturbed on review unless it is contrary to the manifest weight of the evidence.” *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (1st Dist. 2002). “A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence.” *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). Under this deferential standard, the Court may neither substitute its judgment for that of Judge Suriano, nor overturn his judgment “merely because [it] disagree[s] with the judgment or might have come to a different conclusion.” *Fox v. Heimann*, 375 Ill. App. 3d 35, 46 (1st Dist. 2007).

LMEC also challenges Judge Suriano’s admission of extrinsic evidence. Such admissibility rulings are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Skubak v. Lutheran Gen. Health Care Sys.*, 339

Ill. App. 3d 30, 36 (1st Dist. 2003); *Lyon Metal Prods., L.L.C. v. Protection Mut. Ins. Co.*, 321 Ill. App. 3d 330, 345 (2d Dist. 2001). The *de novo* review afforded Judge Suriano’s subsidiary ruling that the tanker remarketing agreements are ambiguous does not extend to other aspects of his admissibility rulings or his resolution of the contractual ambiguity. *Installco*, 336 Ill. App. 3d at 783.

Furthermore, this Court “may affirm the trial court’s decision on any basis supported by the record, regardless of whether the trial court relied on that ground when it made its decision.” *Chapman v. Engel*, 372 Ill. App. 3d 84, 87 (1st Dist. 2007).

## **ARGUMENT**

### **I. The Trial Court Correctly Found No Remarketing Fee Was Due Under The Contractual Fee Formula.**

The tanker remarketing agreements provide that LMEC can receive a remarketing fee only if “Net Equipment Proceeds” from the sale of a tanker exceed \$12.9 million. R C4961 (DA 249; RA ¶ 5); R C5396 (DA 288; TC Sched. X). “Net Equipment Proceeds” are defined as “Equipment Proceeds” minus “Equipment Charges.” R C4958 (DA 246; RA ¶ 1(d)). At trial, defendants showed that LMEC was not entitled to a fee under that formula because Termination Value is an Equipment Charge, and when it is subtracted Net Equipment Proceeds fall below the \$12.9 million fee threshold.

As an amount “due and unpaid by the lessee, directly or indirectly, to [DFO] with respect to the Vessel under the Bareboat Charter” that “relate[s] to periods on or prior to the Expiration Date,” Termination Value precisely fits the definition of Equipment Charges. R C4957 (DA 245; RA ¶ 1(a)). The negotiators for both parties (Ingrid Sarapuu for BFS and Duane Huffine for LMEC) agreed that Termination Value is an Equipment Charge and must be subtracted in calculating Net Equipment Proceeds. *See*

pp. 8-9, *supra*; pp. 18, 21-22, *infra*. And the lone expert to appear at trial (Christopher Gould) testified that failing to subtract Termination Value would completely disrupt the economics of the tanker lease. *See* pp. 10-11, *supra*; pp. 24-26, *infra*. Relying on this unrefuted evidence, Judge Suriano found that the contracting parties “intended termination value to be an equipment charge” and thus Net Equipment Proceeds did not reach the fee threshold. R C8056-57 (DA 348-49); *see also* R C4894-96 (DA 240-42).

LMEC asks this Court to reverse that ruling. It argues that Termination Value is not an Equipment Charge to be subtracted in calculating Net Equipment Proceeds and that Judge Suriano improperly considered extrinsic evidence on the question. But Judge Suriano’s finding that the parties intended Termination Value to be an Equipment Charge is exactly what the evidence shows and thus is not remotely against the weight of the evidence. His admission of extrinsic evidence also was plainly correct, not an abuse of discretion or otherwise in error. Judgment for defendants therefore should be affirmed.

**A. Termination Value Does Not Have To Be Specifically Listed To Be An Equipment Charge.**

The tanker remarketing agreements define Equipment Charges as “amounts received or then due and unpaid” to DFO with respect to the tankers relating to periods on or prior to the Expiration Date, and then gives examples: “including all agreements of tax or other indemnity, Termination Payment or Casualty Payment.” R C4957 (DA 245; RA ¶ 1(a)). LMEC argues (at 22-23, 27-28) that because the definition of Equipment Charges lists certain items as Equipment Charges and Termination Value is not among those listed items, Termination Value is not an Equipment Charge. According to LMEC, if the contracting parties had intended Termination Value to be an Equipment Charge, the definition would specifically list it as such. This argument is completely without merit.

First, although Termination Value is not one of the listed examples, the list is introduced by “including” and “[t]he participle *including* typically indicates a partial list.” *People v. Perry*, 224 Ill. 2d 312, 330-31 (2007). Thus the definition sets forth a partial, not exhaustive, list.

Second, there is no dispute that some Equipment Charges are not specifically listed. Thus, LMEC has repeatedly cited rent, which is not specifically identified in the definition, as an Equipment Charge. R C3850-51 (DA 65-66; Tr.) (“what these equipment charges are – as you’ll see, *some* of them are identified ... one of them [not identified] is *rent*.”) (emphasis added); R C8025-26 (DA 341-42; Tr.) (“The capital hire, the rent, those are all equipment charges.”); Pl.’s Br. 30. Significantly, it is undisputed that Termination Value is simply a substitute for rent when a lease ends early. R C4664 (DA 201; Gould) (“the termination value is a lump sum theme that’s in the nature of rent. It’s like the rent being accelerated.”).

Third, both contract negotiators testified that BFS and LMEC intended Termination Value to be subtracted as an Equipment Charge. LMEC’s Huffine expressly affirmed that “Termination Value is included within Equipment Charges and, therefore, needs to be subtracted to get net equipment proceeds.” R C4440 (DA 152). BFS’s Sarapuu likewise explained that “once Beatrice had gotten its baseline expected profits which would have been in termination value, then [LMEC] could get a percentage of the profits that we achieved above that.” R C3958 (DA 86). There is no reason to speculate about what the contracting parties intended. The contract negotiators on both sides of the transaction have told us.

Fourth, LMEC's contention that the Court should *presume* that the contracting parties would have more clearly included Termination Value as an Equipment Charge if that was their intent is a complete logical fallacy. To begin with, one could just as easily say the opposite—that the contracting parties would have more clearly *excluded* Termination Value as an Equipment Charge if that is what they intended—especially since Termination Value must be subtracted to preserve the economic purpose of the underlying leveraged lease transactions (*see* pp. 10-11, *supra*; pp. 24-27, *infra*). Indeed, it is always possible in hindsight to suppose that the parties could have written a more specific contract removing any doubt over the meaning of a disputed provision. But such speculation offers no basis to choose one party's reading over another's—particularly here, where two sophisticated parties negotiated the terms of the contract and had their joint counsel draft it. R C3977-81, C4007-11 (DA 90-94, 100-104) (Sarapuu testimony on negotiations and joint counsel); R C4296-97 (DA 122-23) (Huffine testimony on negotiations); *see also* *JA Apparel Corp. v. Abboud*, No. 07 Civ. 7787, 2008 WL 2329533, at \*13 (S.D.N.Y. June 5, 2008) (“the task presented to this Court is to interpret the contract as it was written, not to speculate as to how it could have been better drafted by either of the parties”).

In any event, the time to apply any such presumption or default rule is “*after* extrinsic evidence has been considered[, f]or until then, [a court does] not know whether [it has] an intractable interpretive issue or merely an issue that cannot be resolved without testimony or other evidence besides the language and logic of the contract.” *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607-09 (7th Cir. 1993) (Posner, J.) (courts should only “lay down default rules to solve contractual disputes *when the parties’ intentions*

*cannot be determined*”). Here, the extrinsic evidence—from Huffine, Sarapuu, and Gould—resolves in defendants’ favor any ambiguity in the Equipment Charges definition, such that resort to any default rule for presuming party intent is inappropriate. See pp. 8-9, 10-11, 18, *supra*; pp. 21-22, 24-26, *infra*.

LMEC’s effort to rescue its presumed intent argument by invoking the presumption against adding terms to a contract, described in *Klemp v. Hergott Group, Inc.*, 267 Ill. App. 3d 574, 581 (1st Dist. 1994), is misplaced. Illinois courts have explained that the *Klemp* presumption applies to cases “where an uncertainty exists as to the existence of a contract term,” not cases involving “uncertainty [in] the meaning of contract terms that were used.” *Shields Pork Plus, Inc. v. Swiss Valley Ag Serv.*, 329 Ill. App. 3d 305, 312 (4th Dist. 2002) (rejecting claim that clearer language “easily could have been included”). Judge Suriano determined the meaning of the Equipment Charges provision, deciding that the amounts “due and unpaid” to DFO with respect to the tankers included Termination Value. R C4894 (DA 240); R C8055-57 (DA 347-49). That was a task of interpretation, not revision, so the *Klemp* presumption does not apply.

**B. Termination Value Was “Due And Unpaid” And Thus Must Be Subtracted As An Equipment Charge.**

LMEC asserts (at 23-27) that Termination Value was not “due and unpaid” under the Purchase Payment formula of the Time Charter, which sets the amount the Navy must pay upon a purchase option exercise. According to LMEC, Termination Value is payable only to the extent a component of Termination Value (*i.e.*, Termination Value—Debt or Termination Value—Equity) exceeds the Purchase Price. Because neither Termination Value component exceeded the \$25 million Purchase Price (for either tanker), LMEC argues, no Termination Value was paid here. And even if Termination Value had been

paid, LMEC continues, it would have been added to (not subtracted from) the Purchase Payment. These arguments are rife with errors and completely contradicted by the testimony of the contract negotiators.

First, Termination Value was “due.” The Navy’s Purchase Payment could never be smaller than the total Termination Value (*i.e.*, the sum of Termination Value—Equity and Termination Value—Debt), no matter the Purchase Price. R C5284-85 (DA 282-83; TC Art. 5(h)(5)).<sup>6</sup> As the minimum amount the Navy had to pay, Termination Value therefore was “due” when the Navy exercised its purchase option.

At trial, the contract negotiators confirmed this was their intention. LMEC’s Huffine testified that Termination Value is “the minimum amount the Navy has to pay.” R C4441 (DA 153). As such, he explained, it is “an amount owed” and thus fits the portion of the Equipment Charges definition covering “amounts received or due by the lessee directly or indirectly to [the owner-lessor] with respect to the vessel under the Bareboat Charter.” R C4442 (DA 154). BFS’s Sarapuu likewise testified that Termination Value is the minimum amount due to the owner-lessor upon an early end to the lease. R C3981 (DA 94) (“Termination value ... was the amount that the lessor would need to receive to make him whole . . . if the lease . . . fell apart”). Significantly, at trial, even counsel for LMEC agreed: “Termination value is the minimum the Navy has to pay if they exercise the purchase option. We don’t really dispute that.” R C4838 (DA 233).

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<sup>6</sup> Contrary to LMEC’s claim (at 25), the Purchase Payment includes the amount by which Termination Value—Debt exceeds the Purchase Price and the amount by which Termination Value—Equity exceeds *any Purchase Price remaining after the subtraction of Termination Value-Debt*. R C5284-85 (DA 282-83; TC Art. 5(h)(5)). That sum equals the amount by which total Termination Value exceeds the Purchase Price, which ensures that the total Termination Value is the minimum Purchase Payment.

To be sure, LMEC is correct that the Navy paid no Termination Value for either tanker because the \$25 million Purchase Price exceeded Termination Value. R C5801 (DA 295; Gianella VPA, Ex. A); R C5807 (DA 300; Matthiesen VPA, Ex. A). But that only confirms that in this case Termination Value was “unpaid,” as provided for in the Equipment Charges definition. R C4957 (DA 245; RA ¶ 1(a)). That it was “unpaid” does not change the fact—confirmed by the contract negotiators—that Termination Value was the minimum amount “due.” *See* R C4316 (DA 131) (Huffine agreeing that “under the definition of equipment charges . . . , in which an equipment charge is an amount due or unpaid by the lessee under the lease, that includes termination values”).

Finally, LMEC’s claim (at 25) that Termination Value would be added to (not subtracted from) the Navy’s Purchase Payment is completely irrelevant and does not at all support LMEC’s contention that Termination Value is not subtracted as an Equipment Charge when calculating the Net Equipment Proceeds on which any remarketing fee depends. A Purchase Payment is made by the Navy to the owner-lessor under the Time Charter (after passing through the Contractor per the Bareboat Charter). R C5284-85 (DA 282-83; TC Art. 5(h)(5)); R C5020-21 (DA 258-59; BC § 6.2). By contrast, a remarketing fee is paid by the owner-lessor to LMEC based on the amount of Net Equipment Proceeds under the tanker remarketing agreements. R C4961 (DA 249; RA ¶ 5). The question here is how to calculate a remarketing fee under the tanker remarketing agreements, *not* how to calculate a Purchase Payment under the Time Charter.

In sum, the tanker remarketing agreements leave no doubt that Termination Value, as an amount due and unpaid with respect to the tankers, is an Equipment Charge that must be subtracted in calculating any remarketing fee. R C4958 (DA 246; RA ¶

1(d)) (Net Equipment Proceeds—the basis for any remarketing fee—“shall mean the Equipment Proceeds attributable to the Vessel less the Equipment Charges attributable to the Vessel”). The contract negotiators agreed. R C4440 (DA 152) (Huffine agreeing that “Termination Value . . . needs to be subtracted to get net equipment proceeds”); R C3958 (DA 86) (Sarapuu testifying that LMEC “could get a percentage of the profits that we achieved above” Termination Value). And it makes perfect sense that the minimum Purchase Payment amounts guaranteed by the Time Charter would be subtracted from the amounts used to calculate LMEC’s fee for remarketing, because those amounts could not be due to remarketing.

**C. The Equipment Charges Provision Is Not A Nullity That Is Always Cancelled Out.**

LMEC contends (at 29-31) that all Equipment Charges, including Termination Value, are completely irrelevant because they are both added and subtracted in the fee calculation and thus net out so that a remarketing fee would be the same no matter the amount of Equipment Charges. This argument, which reduces the Equipment Charges provisions to a nullity, is obviously wrong.

Equipment Charges encompass “amounts [a] received *or* [b] *then due and unpaid.*” R C4957-58 (DA 245-46; RA ¶ 1(a)) (emphasis added). Equipment Proceeds include “amounts *actually received . . . in payment of Equipment Charges.*” R C4958 (DA 246; RA ¶ 1(b)) (emphasis added). Thus, only the first category of Equipment Charges, those “actually received,” are added to Equipment Proceeds. “Due and unpaid” Equipment Charges, such as the Termination Value here (*see* pp. 21-22, *supra*), are not. That is why LMEC’s own negotiator expressly testified that Termination Value is (only) subtracted, so that, here, Net Equipment Proceeds fall short of the threshold for a

remarketing fee. R C4440 (DA 152) (agreeing that “Termination Value . . . needs to be subtracted to get net equipment proceeds” and “no remarketing fee is owed”); *see also* R C4307-08, C4311, C4318 (DA 128-29, 130, 133; Huffine) (same). The plain language of the tanker remarketing agreements and the uncontradicted testimony of the contract negotiators thus refute LMEC’s claim that Equipment Charges “net out” here.

LMEC argues (at 31) that both adding and subtracting Equipment Charges is a “belt and suspenders” way to ensure that any fee “was measured solely by Net Equipment Proceeds (subtracting out any Equipment Charges).” But if Equipment Charges always netted out, the Equipment Charges provision and the provisions adding and subtracting Equipment Charges would be pure surplusage. LMEC’s “net out” argument thus blatantly violates the rule that contracts must be read to “avoid interpretations that render contract terms surplusage.” *RBC Mortgage Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 349 Ill. App. 3d 706, 715 (1st Dist. 2004).

**D. The Economics Of The Tanker Transactions Require Subtracting Termination Value In Calculating Any Remarketing Fee.**

LMEC argues (at 28-29) that Judge Suriano’s—and the contract negotiators’—reading of the Equipment Charges definition must be wrong because it contradicts the economics of the Navy tanker transaction and makes a remarketing fee impossible. There is not a shred of evidence for LMEC’s argument, which reflects a fundamental misunderstanding of the tanker transactions and is completely contrary to the evidence.

Leveraged leasing expert Chris Gould gave uncontradicted trial testimony on the economics of the Navy tanker deal. *See Am. Coll. of Surgeons v. Lumbermens Mut. Cas. Co.*, 142 Ill. App. 3d 680, 702 (1st Dist. 1986) (“It is a proper r[o]le of expert testimony to assist the jury to understand and apply the terms of a contract.”); *see also William*

*Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 339-40, 343-44 (1st Dist. 2005) (investment banking expert opinions regarding contract); *Daugherty v. Burns*, 331 Ill. App. 3d 562, 572-74 (4th Dist. 2002) (expert opinions on crop-share leases, including related tax issues). His expert testimony shows that failing to subtract Termination Value as an Equipment Charge in calculating any remarketing fee would seriously disrupt the carefully structured economics of the Navy tanker deal in two related ways.

First, looking forward from the lease's inception, if the Navy exercised its purchase option in any of the first 11 out of 15 years during which it could do so, the owner-lessor would lose money—as much as \$9 million for a single tanker—after paying LMEC the fee due under LMEC's method of calculating fees (*i.e.*, without subtracting Termination Value). R C4592-94 (DA 184-86; Gould). When LMEC's method of fee calculation is applied to a purchase option exercise in those years, the result is that “the ship owner is getting not only completely wiped out, but they're looking [at] huge losses while the intermediary, Lease Management, according to this formula, is taking home huge profits.” R C4593 (DA 185; Gould).<sup>7</sup> The record is uncontested that a deal with this result would have made no economic sense for the owner-lessor and would contradict the basic leveraged leasing principle that remarketing fees are paid out of any upside an owner realizes on a sale. R C4637 (DA 199; Gould) (“the investor is going into the transaction with the expectation of the benefit of its bargain . . . the whole principle of remarketing agreement and residual sharing is to be sharing from the up side once that bargain has been realized.”).

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<sup>7</sup> Under LMEC's reading, even during the last four years the owner-lessor would not receive its promised after-tax yield, which was the negotiated “heart of the deal.” R C4540-41, C4547, C4594-95, C4609-10 (DA 168-69, 171, 186-87, 194-95; Gould).

Second, the likelihood that the owner-lessor would suffer such losses due to LMEC's fee upon a purchase option exercise would have precluded the tax benefits the Navy tanker deal was designed to obtain. Eligibility for those tax benefits depended on the lease transaction appearing at the outset to be profitable for the owner-lessor. R C4532-33 (DA 165-66; Gould) ("All leveraged leases have to satisfy fundamental tax principles, the key of which is the deals have to . . . be profitable."). Securing the desired tax treatment was central to the tanker deal. R C4529-30 (DA 162-63; Gould) ("tax benefits" are one of the "economic benefits ... a lessor [is] supposed to get out of a leveraged lease."); R C4586-87 (DA 182-83; Gould) ("the transaction being construed as a lease by the IRS [was] critical to obtaining the intended outcome."). As Gould explained, "huge losses" wiping out pretax profit "would just blow this deal out of the water." R C4607 (DA 192).

Indeed, BFS took the unusual step of obtaining an advance ruling from the IRS blessing the proposed tax treatment. R C4603-04 (DA 188-89; Gould). In that ruling, the IRS expressly relied upon BFS's representation that the owner-lessor "expects to receive a profit from this transaction exclusive of the value of the benefits from any tax attributes." R C6048, C6069 (DA 326, 327; IRS Ruling). LMEC's position on the Termination Value issue thus requires believing not only that BFS decided to scotch its right to the important tax benefits of the Navy tanker deal but also that it committed tax fraud by misrepresenting the deal to the IRS. R C4608 (DA 193; Gould) (agreeing that "if plaintiff's formula . . . were indeed the formula for the remarketing fee . . . the representation made to the [IRS would not] have been true.").

LMEC's completely uncorroborated claim that BFS entered a deal with such disastrous consequences—no tax benefits and massive losses for 11 years—tramples the bedrock rule that “[c]ourts will construe a contract reasonably to avoid absurd results.” *Foxfield Realty*, 287 Ill. App. 3d at 524. Indeed, “to the extent that a contract is susceptible of two interpretations, one of which makes it fair, customary, and such as prudent persons would naturally execute, while the other makes it inequitable, unusual, or such as reasonable persons would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred.” *Id.* Gould’s uncontradicted testimony shows that if LMEC’s interpretation were accepted, then BFS must, inexplicably, have decided to enter a patently ridiculous deal. LMEC’s interpretation must therefore be rejected.

Contrary to LMEC’s argument (at 28-29), doing so does not make a remarketing fee impossible. LMEC asserts that subtracting Termination Value in calculating a remarketing fee makes a fee impossible because the \$35 million Purchase Price required to generate a fee would be 30% to 40% above the agreed \$25 million fair market value at which the tankers were sold. But fair market value is not a fixed number and was not known when the Navy, BFS, or LMEC entered the relevant contracts. Instead, it was set by agreement of the Navy and the owner-lessor 18 years later when the Navy exercised its purchase option. R C5283-84 (DA 281-82; TC Art. 5(h)(3)); R C5797 (DA 291; VPA). Nothing prevented the Navy and DFO from agreeing to a fair market value high enough to make Net Equipment Proceeds—after subtraction of Termination Value—exceed the threshold for a remarketing fee. The fair market value the Navy and DFO negotiated simply turned out to be too low to generate a fee.

**E. The *BATL* Case Is Irrelevant.**

LMEC raises (at 31-32) a pre-trial ruling in its entirely separate case against Bell Atlantic Tricon Leasing (“*BATL*”). In *BATL*, which concerned LMEC’s claim for a remarketing fee on a different tanker, Circuit Judge Preston concluded that “no Termination Payment occurred under the Time Charter.” R C7763 (DA 334; Order). But *BATL* does not help LMEC for three reasons. First, *BATL*, which is the subject of a separate appeal (No. 1-08-1199), involves different facts, arguments, and evidence than this case. Indeed, in light of those differences, this Court already denied LMEC’s motion to consolidate the appeals. 9/9/08 Order (DA 351).

Second, Judge Preston’s finding that “no Termination Payment occurred” is completely irrelevant to this appeal because defendants never made that argument in this case. Judge Preston did not decide the issue actually presented here: whether Termination Value was an amount “due and unpaid” with respect to the tanker. Nor did he consider much of the evidence presented here, including Gould’s expert testimony. Significantly, because he ruled before trial, Judge Preston did no weighing of the evidence whatsoever. And, as LMEC admits by correcting Judge Preston’s misapplication of termination concepts to a purchase option exercise (at 31), Judge Preston simply misunderstood how the contracts treat purchase option exercises.

Third, even if it were germane (it isn’t), Judge Preston’s ruling simply is not legitimate authority in this Court. “[T]he decisions of circuit courts have no precedential value” and should not be cited. *Delgado v. Bd. of Election Comm’rs*, 224 Ill. 2d 481, 488 (2007). In fact, Judge Preston’s ruling is a matter outside the trial record that may not properly be considered. *Buckner v. Causey*, 311 Ill. App. 3d 139, 145 (1st Dist. 1999). Judge Suriano correctly refused to consider Judge Preston’s ruling—just as, at LMEC’s

urging, Judge Preston refused to consider Judge Suriano's ruling. R C7768 (DA 337; Opp.). This Court should likewise disregard Judge Preston's ruling.

**F. The Trial Court Properly Admitted Extrinsic Evidence.**

Facing undisputed and unanimous testimony from both of the contract negotiators and a leveraged leasing expert that Termination Value is an Equipment Charge that must be subtracted in calculating any remarketing fee, LMEC attacks (at 32-37) Judge Suriano's admission of extrinsic evidence. In doing so, however, LMEC mischaracterizes the record and misapplies Illinois law.

LMEC spins a tale about how it was ambushed at trial by testimony from Huffine and Sarapuu on the Termination Value issue that Judge Suriano blithely admitted and only came to rely on after trial. But that is not what happened. From summary judgment onward, defendants argued for the consideration of extrinsic evidence on the ground that the Equipment Charges definition does not unambiguously say what LMEC claims. R C3098 (DA 26; Reply); R C3249 (DA 35; Tr.); R C3395-97 (DA 40-42; Resp.); R C3936-37, C4846-47 (DA 74-75, 234-35; Tr.).<sup>8</sup> As for Judge Suriano's treatment of LMEC's motions in limine, LMEC's counsel agreed to proceed without a pre-trial ruling. R C3810, C3935 (DA 64, 73). A trial court, in any event, has "broad discretion" to defer a ruling on a motion in limine. *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (1st Dist. 2003). And whether he read the motion in limine briefing or not, Judge Suriano heard full argument from both sides on whether the extrinsic evidence

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<sup>8</sup> Ironically, LMEC opposed defendants' dismissal motion on contractual ambiguity grounds, promising that extrinsic evidence would prove its entitlement to a fee. R C395-96 (DA 11-12; Mem.). When discovery revealed that the extrinsic evidence showed the opposite, LMEC changed its position.

should be admitted and he individually considered each piece of testimony to which LMEC objected. R C3860-64, C3934-47, C4798-4818 (DA 67-71, 72-85, 212-232).

Judge Suriano specifically found *at trial* that ambiguity warranted the admission of extrinsic evidence on the Termination Value issue. R C4798-4800 (DA 212-14) (overruling parol evidence objections to testimony about subtraction of Termination Value because “there is an ambiguity in the contract”). And he expressly relied on that extrinsic evidence—particularly testimony from Huffine and Sarapuu regarding the potential excessiveness of LMEC’s fee—in ruling *at trial* that “the parties did intend to include a termination value as a part of the equipment charges.” R C4894 (DA 240). In post-trial proceedings, Judge Suriano withdrew his separate comments about Termination Payment (which had nothing to do with defendants’ arguments in this case), but reaffirmed his central trial finding that “the parties intended termination value to be an equipment charge.” R C8004-05, C8056-57 (DA 339-40, 348-49). Judge Suriano also explained his view that the “due and unpaid” language of the Equipment Charges definition is ambiguous, and noted his reliance on not just the contract negotiators’ testimony, but also Gould’s expert testimony (which LMEC conveniently ignores). R C8055-57 (DA 347-49).<sup>9</sup>

***Contractual Ambiguity.*** LMEC’s misrepresentations of the record are just a distraction to obscure the fact that Judge Suriano properly admitted extrinsic evidence to determine whether Termination Value is an Equipment Charge subtracted in calculating any remarketing fee. It is black letter law that “[w]hen . . . the language of a contract is

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<sup>9</sup> LMEC’s quotation (at 36) from the post-trial ruling misleadingly omits the paragraphs in which Judge Suriano noted his reliance on Gould’s testimony and referred to Huffine and Sarapuu testimony about avoiding an exorbitant remarketing fee. R C8056 (DA 348).

ambiguous, its meaning must be ascertained through a consideration of extrinsic evidence.” *William Blair*, 358 Ill. App. 3d at 334. “A contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning.” *Id.* Standing alone, the “due and unpaid” language of the Equipment Charges definition certainly satisfies that test for contractual ambiguity. As we have shown, LMEC’s reading of the “due and unpaid” language—if reasonable at all—is certainly not the only reasonable interpretation. *See pp. 20-23, supra.* Judge Suriano thus correctly found ambiguity and admitted extrinsic evidence. R C8055-56 (DA 347-48; Tr.); R C4799-4800 (DA 213-14; Tr.). The Court need go no further to affirm Judge Suriano’s admission of extrinsic evidence.

***Provisional Admission.*** Even if the “due and unpaid” language, on its face, somehow did appear to unambiguously exclude Termination Value from being an Equipment Charge—which defendants strongly deny—extrinsic evidence still would be admissible for a second, independent reason. Illinois courts adhere to the “provisional admission approach,” which allows a court to reference extrinsic evidence “to determine that words, seemingly unambiguous within the four corners of a contract, are, nevertheless, blatantly ambiguous within the broader context of the parties’ dealings.” *William Blair*, 358 Ill. App. 3d at 339; *see also Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 889 (1st Dist. 1995) (agreeing that “trial court may provisionally consider extrinsic evidence to ascertain the definition of terms used by the parties in its effort to determine whether the contract is ambiguous”). Because the extrinsic evidence here refutes any claim that Termination Value unambiguously falls outside the Equipment Charges definition, it plainly qualifies for admission.

LMEC disagrees, arguing that the tanker remarketing agreements supposedly are “integrated.” But only an *explicit integration clause* bars provisional admission, as LMEC itself admits (at 31). *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464-66 (1999).<sup>10</sup> The tanker remarketing agreements contain no integration clause: no provision describes the agreements to be the sole, entire, or integrated agreements between the parties on tanker remarketing fees, superseding prior negotiations, representations, and agreements. *See id.* at 460 (example of integration clause); *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 758 (1st Dist. 2004) (same). Accordingly, even if the contract language appeared to unambiguously support LMEC’s position—which it does not—the case law establishes that Judge Suriano properly considered extrinsic evidence on the Termination Value issue.

***Subjective Beliefs.*** LMEC asserts that Judge Suriano should have excluded the Huffine and Sarapuu testimony on the Termination Value issue because it supposedly contradicted the contracts and conveyed only subjective beliefs. We have already shown that the Termination Value testimony is perfectly consistent with the contracts. *See pp.* 17-24, *supra*. Moreover, that testimony reflected the agreed intent of the parties, not the mere subjective beliefs of Huffine and Sarapuu. Both contract negotiators agreed that the tanker remarketing agreements require Termination Value to be subtracted from the

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<sup>10</sup> LMEC appears to confuse two distinct interpretation rules. Integration bars the use of extrinsic evidence to add or change contractual terms or to prove non-integration. *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 271-72 (1994); *Eichengreen v. Rollins, Inc.*, 325 Ill. App. 3d 517, 521-25 (1st Dist. 2001). But only an integration clause bars the use of extrinsic evidence to reveal contractual ambiguities. *Air Safety*, 185 Ill. 2d at 464-66. Contrary to LMEC’s argument, in the absence of an express integration clause, the supposed integration of the tanker remarketing agreements is no barrier to using extrinsic evidence to reveal (and resolve) ambiguity in the meaning of the “due and unpaid” language.

proceeds on which any remarketing fee would be paid. R C3958, C3981, C3985 (DA 86, 94, 95; Sarapuu); R C4440-41 (DA 152-53; Huffine). And Sarapuu described how the tanker remarketing agreements were “created” to ensure the owner-lessor received Termination Value before any remarketing fee would become due. R C3985 (DA 95).

Illinois courts routinely consider such testimony about the negotiations and agreed intent of the contracting parties when interpreting contract provisions. *Shields Pork Plus*, 329 Ill. App. 3d at 312-14 (relying on testimony about “intent of the parties” and noting that where “previous negotiations make it manifest in what sense the parties understood and used the contract’s terms, they furnish the best definition to be applied in the construction of the contract itself”); *Meyer*, 273 Ill. App. 3d at 889 (trial judge “correctly permitted” witness who approved contract “to testify regarding his understanding of the contract”); *Keep Prods., Inc. v. Arlington Park Towers Hotel Corp.*, 49 Ill. App. 3d 258, 263 (1st Dist. 1977) (“The court properly admitted relevant parol evidence of the negotiations between the parties”). Indeed, the very case LMEC cites (at 37) to support its subjective-belief argument holds that any ban on subjective evidence does not apply where, as here, “the parties agree.” *Home Ins. Co. v. Chi. & Nw. Transp. Co.*, 56 F.3d 763, 769 (7th Cir. 1995).

At bottom, LMEC invokes all of these plainly inapplicable rules of interpretation in an effort to hide from this Court the fact that all of the evidence shows that the contracting parties intended Termination Value to be subtracted from the proceeds on which any remarketing fee would be calculated. But the parties’ agreed intent is the touchstone of contract interpretation, and evidence of that intent should not be ignored. Judge Suriano thus properly relied on, and did not abuse his discretion in admitting, the

extrinsic evidence that proves LMEC and BFS agreed that LMEC is not entitled to any remarketing fee in the circumstances here.

**II. The Judgment For Defendants Should Be Affirmed Because The Expiration Date Required For Payment Of A Remarketing Fee Never Occurred.**

The Court should also affirm the judgment for defendants for a second, independent reason: the Expiration Date that the tanker remarketing agreements require for payment of a remarketing fee never occurred. The Expiration Date is the date on which “the Navy is required to return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter.” R C4958 (DA 246; RA ¶ 1(c)). No Expiration Date occurred because, as defendants showed at trial, the Navy was not required to “redeliver” the tankers pursuant to the Time Charter when it exercised its purchase option.

The terms of the Time Charter show that the tanker remarketing agreements’ “return possession pursuant to the terms of the Time Charter” language could only refer to the Time Charter’s “redelivery” requirement, and that redelivery is not required upon a purchase option exercise. *See* pp. 37-38, *infra*. A comparison of the tanker remarketing agreements with the template from which BFS and LMEC adapted those agreements shows that the parties deliberately removed Expiration Date and other language allowing a remarketing fee upon a purchase option exercise. *See* pp. 39-41, *infra*. LMEC’s own negotiator testified that the parties inserted the “return possession” language as a reference to the Time Charter’s redelivery obligation. R C4435-36 (DA 147-48). And BFS’s negotiator testified that the parties agreed to bar a remarketing fee upon a purchase option exercise. R C3993 (DA 98).

Despite this evidence, Judge Suriano stated in dicta that the tanker remarketing agreements could be read in a way that did not automatically preclude a remarketing fee

following the Navy's exercise of its purchase option. R C4891-94 (DA 237-40). But that conclusion rests entirely on a factual error, and LMEC's effort to supply additional grounds is without merit.

**A. The Ambiguity In The Expiration Date Provision Should Not Be Construed Against Defendants.**

LMEC incorrectly asserts (at 3, 13) that Judge Suriano found that *under the plain language of the tanker remarketing agreements* the Navy's purchase option exercise constituted a remarketing event. In reality, Judge Suriano never claimed that the plain language of the tanker remarketing agreements allowed a remarketing fee when the Navy exercises its purchase option. R C4891-94 (DA 237-40). Instead, Judge Suriano specifically found that the Expiration Date definition was ambiguous—as LMEC elsewhere acknowledges (at 11). R C4793 (DA 207) (“what I find is that the term concerning expiration date is ambiguous”); R C4254 (DA 112) (“I don't believe it is clear exactly what it means to return possession of the vessel”).

Based on his assumption that the Winston & Strawn lawyers who wrote the tanker remarketing agreements represented defendants alone, Judge Suriano decided “to construe the ambiguity against” defendants. R C4893 (DA 239). Thus, he accepted LMEC's claim that if the contracting parties had intended to preclude a fee when the Navy exercised its purchase option, the tanker remarketing agreements would have said so more plainly. R C4892 (DA 238). He gave three reasons for believing that if the Expiration Date provision were construed in LMEC's favor it “could mean” what LMEC claims: (1) a claimed mismatch between the “return possession” language of the remarketing agreements and the “redelivery” language of the Time Charters; (2) supposed ambiguity in the purpose of the changes to the template remarketing agreement;

and (3) supposed testimony from Huffine that a Navy purchase option exercise was not discussed in negotiations. R C4891-93 (DA 237-39).<sup>11</sup> Every aspect of this analysis, however, was the product of legal or factual errors.

***Contract Drafter.*** The decision to “construe the ambiguity” in the Expiration Date definition against defendants rested on the mistaken premise that the Winston & Strawn lawyers who prepared the tanker remarketing agreements represented BFS alone. R C4893 (DA 239). In reality, it is uncontested in the record that “Winston & Strawn . . . represented both parties on the remarketing agreement.” R C4007 (DA 100). In post-trial proceedings, Judge Suriano acknowledged his mistake, commenting, “I don’t know where I came up with that.” R C8042 (DA 345). His decision to construe the ambiguity in the Expiration Date definition against defendants, as the presumed drafter, was the critical final step of his analysis, taking him from ambiguity to the conclusion that the Navy’s purchase option exercise could trigger a remarketing fee.

The absence of any legitimate reason to construe contractual ambiguities against defendants completely eliminates any basis for assuming, as LMEC urges (at 13-14), that the contracting parties would have more clearly *barred* a remarketing fee upon a purchase option exercise if that was their intent. *See* pp. 19-20, *supra*. One could just as easily say the opposite—that the contracting parties would have more clearly *permitted* a remarketing fee upon a purchase option exercise if that was their intent. *See JA Apparel*, 2008 WL 2329533, at \*13 (inferring intent from absence of clearer language “is a recursive argument that does not aid the Court’s analysis”). After all, the parties did not

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<sup>11</sup> LMEC incorrectly suggests (at 16) that Judge Suriano also relied on testimony from Huffine that a Navy purchase option exercise could be a remarketing event. Judge Suriano never even mentioned, let alone relied on, that testimony (R C4891-94 (DA 237-40)), which is irrelevant for reasons we explain below (*see* pp. 48-49, *infra*).

define Expiration Date as occurring upon any of the events that, according to LMEC (at 13-16), trigger a remarketing fee—a purchase, the end of the Time Charter, the end of the Bareboat Charter, or the relinquishment of the Navy’s rights to use, occupancy, and direction. Moreover, as we detail elsewhere (*see* pp. 39-41, *infra*), the parties made specific changes to the remarketing agreement in order to prevent a remarketing fee upon a purchase option exercise, which makes reliance on any such presumption particularly inappropriate. *See Bidlack*, 993 F.2d at 607-09.

***Return Possession and Redeliver.*** Although the words “return possession” and “redeliver” are not the same, they are synonyms, and the record clearly establishes that the tanker remarketing agreement language making no fee due until the date “on which the Navy is required to return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter” (R C4958 (DA 246; RA ¶ 1(c))) refers to the Time Charter’s requirement that the Navy “redeliver the Vessel to the Contractor” (R C5272-73 (DA 270-71; TC Art. 5(b)(4))). To begin with, the use of the “return possession” language rather than the term “redeliver” is of no significance. The tanker remarketing agreements and the Time Charter were written by different lawyers and were agreed to by different parties. R C4383-84 (DA 136-37; Feldman Stip.). And, in the relevant places, the Time Charter does not capitalize “redelivery” or “redeliver” to identify it as a specifically defined term. R C5264, C5272-73, C5274, C5338-40 (DA 268, 270-71, 272, 285-87; TC Art. 4(c), 5(b)(4)), 5(b)(6), 34).

Furthermore, the only textually supported way to read “return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter” is as a reference to the Time Charter’s redelivery requirement. The term “return possession” appears

nowhere in the Time Charter. Indeed, the Time Charter states that “the Contractor shall at all times retain complete and exclusive possession and control of the Vessel.” R C5340 (DA 287; TC Art. 35). The only requirement imposed on the Navy by the Time Charter that in any way resembles a duty to “return possession of the Vessel to the Contractor” is the requirement that the Navy “redeliver the Vessel to the Contractor” in certain circumstances (but not upon a purchase option exercise). R C5272-73 (DA 270-71; TC Art. 5(b)(4)) (“the [Navy] shall, on or before the Termination Date, redeliver the Vessel to the Contractor”); R C5264 (DA 268; TC Art. 4(c)) (“Redelivery of the Vessel, in accordance with Article 34 hereof, shall occur upon the effective date of termination or expiration of this Charter.”); R C5338-39 (DA 285-86; TC Art. 34(a)) (“unless lost, sold or purchased by the [Navy] hereunder, the Vessel shall be redelivered” to the Contractor). To give effect to the words “pursuant to the terms of the Time Charter,” the “return possession” language must therefore be read as a reference to the Time Charter’s redelivery obligation. *See First Bank*, 338 Ill. App. 3d at 40 (“A court will not interpret an agreement in a way that would nullify its provisions or render them meaningless.”).

Testimony from LMEC’s own negotiator equating the tanker remarketing agreement’s “return possession” language and the Time Charter’s “redelivery” obligation confirms that reading. Huffine explained that the contracting parties inserted the “return possession” language so that the owner-lessor would not have to pay a remarketing fee if the Navy “did not return the vessel” under a Time Charter provision requiring the Navy “to redeliver the vessel when the term was over.” R C4435-36 (DA 147-48). In short, the return possession language and the redelivery obligation do “match up.”

**Template Remarketing Agreement.** The template for the tanker remarketing agreement defined the “Expiration Date,” which was a prerequisite to any remarketing fee, as “the date of expiration or earlier termination of the initial lease term.” R C5860 (DA 306; Template ¶ 1(f)).<sup>12</sup> Under the template definition, a purchase option exercise could result in a remarketing fee by terminating the lease. When they wrote the tanker remarketing agreements, however, LMEC and BFS changed the Expiration Date to the date “on which the Navy is required to return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter” (R C4958 (DA 246; RA ¶ 1(c))).

Contrary to the suggestion that the new Expiration Date definition in the tanker remarketing agreements “basically says when the Time Charter ends” just like the template definition (R C4891-92 (DA 237-38)), the parties materially redefined Expiration Date, substituting the “return possession” language for the “expiration or earlier termination” language. Reading the new “return possession” language to mean basically the same thing as the template language it replaced, as LMEC asks the Court to do, would violate the established rule that contract changes signal changes in meaning and effect. *See FSC Paper Corp. v. Sun Ins. Co. of N.Y.*, 744 F.2d 1279, 1281 n.1 (7th Cir. 1984) (rejecting claim that new contract language meant same thing as language it replaced because “[w]e cannot believe that the parties rewrote the valuation clause for no

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<sup>12</sup> At trial, Judge Suriano found that BFS and LMEC drafted the tanker remarketing agreements using a prior general remarketing agreement between them as a template. R C4891-92 (DA 237-38) (“the Court has been shown, what I believe is a template of the remarketing agreement”). The evidence amply supports that finding, which LMEC never mentions, much less challenges. R C3967 (DA 87) (Sarapuu testimony that general agreement was “the basis” and “the precedent that we were going off of” for the tanker remarketing agreements); R C4404-05 (DA 138-39) (Huffine testimony that general agreement “appears to be the template for” the tanker remarketing agreements and that he was “not aware of any other document that was the template.”).

apparent reason”); *Consol. Gas Supply Corp. v. FERC*, 745 F.2d 281, 287 (4th Cir. 1984) (“broad changes in phraseology” from a prior contract “signify differences in meaning”).

The testimony of the contract negotiators confirms the significance of the change in the definition of Expiration Date. BFS’s Sarapuu testified that she told LMEC’s Huffine that the remarketing agreement had to be changed so that a remarketing fee would not be paid upon a purchase option exercise, and he agreed. R C3977-78, C3993 (DA 90-91, 98). Huffine testified that, at the request of Sarapuu, he agreed to change the definition of Expiration Date to save the owner-lessor from paying a fee in the absence of “redelivery” (R C4435-36 (DA 147-48)), which is not required when the Navy exercises its purchase option.

The contracting parties made a similarly significant change to the definition of Equipment Proceeds, the starting point for computing any remarketing fee. The template defined Equipment Proceeds to include “all amounts actually received, directly or indirectly by BFS, (i) from the sale, lease, or other use or disposition of [the equipment] after its Expiration Date, whether to or by *the lessee exercising its rights under the Lease* of such item.” R C5860 (DA 306; Template ¶ 1(e)) (emphasis added). The Time Charter gave the Navy the right to exercise an early purchase option, so under the template definition the remarketing fee calculation would have included proceeds from a purchase option sale. In drafting the tanker remarketing agreements, however, the parties removed the clause referring to a sale to the lessee “exercising its rights under the Lease” but otherwise left the Equipment Proceeds definition intact. R C4958 (DA 246; RA ¶ 1(b)). That deletion shows that LMEC and BFS agreed that proceeds from the Navy’s exercise

of its purchase option—the Navy “exercising its rights under the lease”—would *not* form the basis for a remarketing fee under the tanker remarketing agreements.

In sum, the trial record clearly establishes that BFS and LMEC made substantial changes to the template for the purpose of precluding a remarketing fee upon a purchase option exercise. And, although LMEC’s brief conveniently ignores the template, Illinois courts have long looked to “previous agreements . . . in determining the meaning of specific words and clauses” of a contract. *Martindell*, 15 Ill. 2d at 283; *see also Koelmel v. Kaelin*, 374 Ill. 204, 210-11 (1940) (“even though an instrument is executed independently of any prior agreement of larger scope, other agreements and circumstances preceding its execution may be considered in order to determine the intention of the parties in their use of specific words or clauses”); *Elliott v. LRSL Enters., Inc.*, 226 Ill. App. 3d 724, 729 (2d Dist. 1992) (similar).

***Testimony of Contract Negotiators.*** As for the supposed testimony of LMEC’s Huffine that “there was never a discussion about if the Navy were to exercise an early option purchase” (R C4893 (DA 239)), there is no such testimony. Huffine did testify that he never told Sarapuu of his private belief that a purchase option exercise could give rise to a remarketing fee. R C4426-27 (DA 142-43). And he testified that he recalled no discussion of whether purchase option proceeds would be Equipment Proceeds. R C4425-26 (DA 141-42). But, contrary to LMEC’s assertion (at 16), Huffine never said that the parties did not discuss the availability of a remarketing fee in the event of a purchase option exercise, and LMEC does not quote any testimony or cite any transcript pages suggesting he did.

To the contrary, Huffine testified that Sarapuu was “concerned that she might have to pay a remarketing fee” before the Time Charter required the Navy “to redeliver the vessel” and he “agreed” the owner-lessor should not have to pay a fee in that instance. R C4435 (DA 147). Huffine further explained that the parties redefined Expiration Date as the date on which the Navy was “required to return possession of the Vessel to the Contractor,” in order to save the owner-lessor from having to pay a remarketing fee before a Time Charter “redelivery” obligation required the Navy to “return the vessel.” R C4435-36 (DA 147-48).

Moreover, contrary to the assertion that Sarapuu never “came right out and said we didn’t want the plaintiff to be entitled to a fee if the Navy exercised their option” (R C4894 (DA 240)), Sarapuu expressly testified that the parties agreed to bar a remarketing fee upon a purchase option exercise. She explained that she told Huffine that the Navy “had an option to purchase the vessel at times that did not coincide with the termination of the time charter,” that “there may never have been remarketing services provided” in that circumstance, and that she “didn’t think you should pay for remarketing if [LMEC] wasn’t performing a remarketing service.” R C3977-78 (DA 90-91). According to Sarapuu, Huffine ultimately “agreed” to her position that “no fee was due to [LMEC] when the Navy exercised the option to purchase the vessel prior to the expiration of the lease.” R C3993 (DA 98).

This testimony of the contract negotiators (which LMEC’s brief completely ignores) conclusively establishes that BFS and LMEC agreed to change the tanker remarketing agreements such that the Navy’s exercise of its purchase option would not give rise to a remarketing fee. Such testimony has long informed contract interpretation

in Illinois. *See Shields Pork Plus*, 329 Ill. App. 3d at 312-14 (relying on testimony about “intent of the parties” and “previous negotiations”); p. 33, *supra*.

**B. There Is No Merit To LMEC’s Arguments That The Navy’s Purchase Option Exercise Entitles LMEC To A Remarketing Fee.**

LMEC offers a hodgepodge of arguments that Judge Suriano never accepted and that plainly do not justify LMEC’s claim that the Navy’s purchase option exercise entitles it to a remarketing fee.

*Expiration Date.* LMEC argues (at 13) that the Expiration Date required for it to receive a fee automatically occurs when the Navy exercises its purchase option. According to LMEC, the tanker remarketing agreement’s definition of Expiration Date—the date on which the Navy is “required to return possession of the Vessel to the Contractor pursuant to the terms of the Time Charter”—refers to a metaphysical relinquishment of Time Charter rights to use, occupy, and direct the tanker that occurs whenever the Time Charter ends. That relinquishment of rights occurred here, LMEC asserts, because the Time Charter necessarily ends when the Navy exercises its purchase option. The trial evidence conclusively refutes LMEC’s argument.

To begin with, no Time Charter provision requires the Navy to relinquish use, occupancy, and direction rights upon a purchase option exercise (or at any other time). Unlike the “redelivery” that triggers a fee under defendants’ reading of the Expiration Date definition, therefore, the relinquishment of use, occupancy, and direction rights needed under LMEC’s reading is not something the Navy must do “pursuant to the terms of the Time Charter.” LMEC’s reading thus is at odds with the requirement of the Expiration Date definition that possession of a tanker be returned “pursuant to the terms of the Time Charter.” R C4958 (DA 246; RA ¶ 1(c)); *see pp. 37-38, supra*. Moreover,

LMEC's "relinquish rights to use, occupy, and direct" construction is a much less natural reading of "return possession of the Vessel to the Contractor" than is defendants' "redeliver the Vessel to the Contractor" interpretation. In its ordinary sense, the "return possession" language suggests a physical return of the tanker, as occurs with redelivery, not the kind of metaphysical surrender of rights LMEC contemplates.<sup>13</sup> Illinois law, not surprisingly, prefers the "ordinary and natural meaning" of contract language. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (1st Dist. 2000).

Furthermore, Paragraph 4 of the tanker remarketing agreements directly contradicts LMEC's position that any purchase ends the Time Charter and triggers an Expiration Date. As LMEC itself concedes (at 15), Paragraph 4 expressly recognizes that a tanker could be purchased at a "time other than after the Expiration Date." R 4960 (DA 248). Plainly, then, there can be a purchase that does not result in an Expiration Date.

In addition, under LMEC's argument that the "return possession" language refers to the Navy's supposed relinquishment of its right to use, occupy, and direct the tanker whenever the Time Charter ends, any end to the Time Charter would result in an Expiration Date. Thus, LMEC's reading essentially resurrects the template remarketing agreement's discarded Expiration Date definition. R C5860 (DA 306; Template ¶ 1(f)). But, as noted above, it would defy logic and established principles of contract interpretation to read the "return possession" language to effectively mean "expiration or earlier termination of the lease" when BFS and LMEC deliberately removed that template

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<sup>13</sup> As noted earlier, LMEC's own negotiator testified that the "return possession" language was added in order to save the owner-lessor from having to pay a fee before the Time Charter required it to "redeliver" a tanker. R C4435-36 (DA 147-48).

language from the tanker remarketing agreements and replaced it with the “return possession” language. *See* pp. 39-41, *supra* (citing authorities).

LMEC’s Expiration Date argument is also wrong as a factual matter. Contrary to LMEC’s assumption, when the Navy exercised its purchase option, it did not relinquish (and no one else assumed) the right to use, occupy, and direct the tankers. The Navy simply acquired the additional attributes of ownership and possession that it did not already have. What is more, contrary to LMEC’s assertion, the undisputed trial evidence proved that the Time Charters did *not* end when the Navy exercised its purchase option. Instead, the Navy elected to have the Contractors continue to operate the tankers under the Time Charters and therefore entered agreements providing that the “existing Time Charter shall govern the operation of the Vessel” after the Navy’s purchase. R C5810 (DA 302; Contract Modification); R C4208 (DA 110; Vaughan). The Time Charter did *not* end, and thus, even under LMEC’s reading, the Expiration Date did *not* occur.

***Remarketing Event.*** LMEC argues (at 14-15) that it is entitled to a remarketing fee because the tanker remarketing agreements define “Remarketing” as something that can occur “at any time that the Vessel is available to be purchased or leased from BFS.” R C4959 (DA 247; RA ¶ 1(e)). But those agreements do not promise LMEC a fee any time “Remarketing” is possible. Instead, they permit a fee only if an Expiration Date occurs, which did not happen here. R C4961 (DA 249; RA ¶ 5).

Furthermore, remarketing agreements are designed to protect owners against incurring the burdens of a delayed sale or re-lease after the equipment is returned to the owner. *See Lease Mgmt. Corp.*, 202 Ill. App. 3d at 190-91. But when the Navy exercises its purchase option, the tanker is *not* returned (*i.e.*, redelivered) to the owner. The owner

therefore does not need remarketing to protect it against the insurance, docking, storage, labor and other costs associated with possession. R C5338-39 (DA 285-86; TC Art. 34). Also, because the owner continues to receive rent payments if the Navy does not exercise its purchase option, securing a rapid sale or re-lease is not essential. R C5284-86 (DA 282-84; TC Art. 5(h)(5), (7)). And there is no need to find potential buyers for a purchase option exercise, given that the purchase option belongs exclusively to the Navy. R C5280 (DA 278; TC Art. 5(h)(1)).

**Paragraph 4.** LMEC contends (at 15) that DFO somehow acknowledged a duty to pay a remarketing fee when DFO gave LMEC notice, under paragraph 4 of the tanker remarketing agreements, that the Navy was purchasing the tankers. R C5785 (DA 289; 1/8/03 Ltr.). Paragraph 4 itself, however, demolishes this argument, because it requires notice even when no remarketing fee will be due. As we have explained, the tanker remarketing agreements expressly make a fee payable only after the Expiration Date and not merely upon a tanker sale. R C4961 (DA 249; RA ¶ 5). Paragraph 4, by contrast, requires notice anytime the tanker becomes available for purchase “other than after the Expiration Date” and anytime the owner intends to sell the tanker. R C4960 (DA 248). Thus, the events that require a paragraph 4 notice are *not* the same events that trigger a possible fee. Sending notice, therefore, did *not* acknowledge that a remarketing fee was payable. Indeed, the DFO representative who sent the notice testified that he understood the notice requirement to have no relation to the fee provisions and that DFO never believed LMEC was entitled to a fee. R C4263-67 (DA 114-18; Moskovitz).

**Paragraph 12.** Paragraph 12 of the tanker remarketing agreements excuses LMEC from any remarketing obligation if LMEC decides the Navy is the most likely

purchaser and independent counsel opines that paying a remarketing fee upon a sale to the Navy would be illegal. R C4964-65 (DA 252-53). LMEC claims (at 15-16) that paragraph 12 would serve no purpose unless LMEC was eligible for a remarketing fee when the Navy exercised its purchase option. That argument, however, incorrectly assumes the Navy could purchase a tanker only through a purchase option exercise. In reality, the Navy also could purchase after “expiration” of the full 20-year lease term, and LMEC’s Huffine testified that when he negotiated the tanker remarketing agreements he had believed such a purchase was the most likely result (R C4446-47 (DA 155-56)). Paragraph 12 is best understood as speaking to a Navy purchase after expiration. Moreover, paragraph 12 does not nullify the fee provisions; it merely adds an another condition precedent to any fee—no illegality. Thus, Huffine expressly testified that paragraph 12 “does not guarantee [LMEC] a remarketing fee when the Navy exercises its early purchase option because [LMEC] still would have to meet the requirements for the compensation formula”—something Huffine specifically acknowledged LMEC has not done here. R C4438-40 (DA 150-52).

*Plain Language.* Based on its meritless textual arguments, LMEC insists (at 14, 16) that the tanker remarketing agreements somehow unambiguously allow a remarketing fee upon a purchase option exercise. But Judge Suriano plainly was right in finding ambiguity in the Expiration Date definition. R C4793 (DA 207; Tr.). As we have shown, LMEC’s contention that the “return possession” language refers to a metaphysical “relinquishment of rights”—if reasonable at all, which we deny—certainly is not the only reasonable interpretation. *See* pp. 37-38, 43-45, *supra*. The much more natural reading—that the “return possession” language refers to the Time Charter’s “redelivery”

obligation—is at least as reasonable. Because the “return possession” language thus “can reasonably be interpreted in more than one way due to the indefiniteness of the language,” it satisfies the test for contractual ambiguity. *William Blair*, 358 Ill. App. 3d at 334.

Accordingly, Judge Suriano properly admitted the overwhelming extrinsic evidence confirming that BFS and LMEC agreed that a purchase option exercise would not result in a remarketing fee. *Id.* Moreover, even if the “return possession” language somehow could be thought to unambiguously mean relinquishment of use, occupancy, and direction rights, as LMEC contends (and we deny), admitting the extrinsic evidence still was proper. As we have explained, a court may consider extrinsic evidence “to determine that words, seemingly unambiguous within the four corners of a contract, are, nevertheless, blatantly ambiguous within the broader context of the parties’ dealings.” *Id.* at 339; *see pp.* 31-32, *supra*. Doing so is especially appropriate here where the extrinsic evidence overwhelmingly supports the “redelivery” reading of the “return possession” language.

***Parol Evidence.*** LMEC incorrectly claims (at 16) that testimony from Huffine and Sarapuu bolsters its reading of the Expiration Date definition. LMEC appears to invoke testimony from Huffine that he privately believed a purchase option exercise “would be a remarketing event.” R C4450 (DA 157). We have already shown why the possibility that a transaction is a “remarketing event” does not entitle LMEC to a remarketing fee. *See pp.* 45-46, *supra*. But this one aspect of Huffine’s testimony is irrelevant for a second reason as well: it did not report the agreed intent of the parties.

Huffine admitted that he never told Sarapuu of his apparent private belief that a purchase option exercise could allow LMEC a remarketing fee (albeit not here, after Termination Value is subtracted). R C4426-27 (DA 142-43). Illinois law requires that such unilateral unexpressed intentions be disregarded in interpreting a contract. *See Vill. of S. Elgin v. Waste Mgmt. of Ill., Inc.*, 348 Ill. App. 3d 929, 941 (2d Dist. 2004) (relevant party intent “does not encompass one party’s secret, undisclosed intentions or purely subjective understandings of which the other party is unaware”); *Klemp*, 267 Ill. App. 3d at 582 (rejecting testimony of witness’s “own understanding of the agreement” as “irrelevant to what the parties to the contract intended”). Huffine’s testimony about his private view on remarketing events thus is completely different from his and Sarapuu’s highly probative testimony concerning what they said to each other and their agreed intent on what events would trigger a remarketing fee. *See Am. Coll. of Surgeons*, 142 Ill. App. 3d at 693 (“A contract is to be construed in accordance with the intent of all the parties and not the secret intent of one of them.”).<sup>14</sup>

LMEC also tries to invoke supposed testimony from Huffine and Sarapuu that they always believed the Navy would exercise its purchase option prior to expiration of the full 20-year lease term. Sarapuu did testify that she believed the Navy would exercise its purchase option in the 19th year of the lease. R C4006-07 (DA 99-100). But Huffine testified that, although he expected the Navy to purchase the tankers, he did *not* think a purchase option exercise was “the most likely outcome.” R C4429, C4446-47 (DA 145,

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<sup>14</sup> Contrary to LMEC’s suggestion (at 16), defendants did not elicit Huffine’s testimony on his unexpressed intention. R C4450 (DA 157). Indeed, defendants objected at trial, and beforehand, to the testimony. R C4450-51 (DA 157-58; Tr.); R C3625-27 (DA 44-46; Objs.). Although Judge Suriano overruled the objection (R C4451 (DA 158)), there is no indication that he relied on that legally irrelevant testimony (R C4891-94 (DA 237-40)), and, for the reasons already noted, it would have been legal error to do so.

155-56). Those expectations dovetail with the testimony on contract negotiations. Sarapuu—who believed the Navy would exercise its purchase option—pushed for changing the tanker remarketing agreements to make a remarketing fee unavailable upon a purchase option exercise, while Huffine—who did not think the Navy would exercise its purchase option—was willing to agree to those changes. *See* pp. 41-42, *supra*.

### CONCLUSION

For the foregoing reasons, defendants respectfully ask that the judgment of the circuit court be affirmed.

January 14, 2009

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Respectfully submitted,

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Company n/k/a Ford Motor Credit  
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By: \_\_\_\_\_  
One Of Their Attorneys

**CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

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Joshua D. Yount

## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on January 14, 2009 he caused three copies of the foregoing **Brief of Defendants-Appellees DFO Partnership et al.** and the accompanying **Supplementary Separate Appendix of Defendants-Appellees** to be placed with the U.S. Postal Service for first-class mail delivery to the persons listed below, and also transmitted a copy of the **Brief** to the persons listed below by e-mail.

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